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In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

ROBERT H. MATHEWS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

RICHARD G. WILKINS
Assistant to the Solicitor General

ROBERT S. GREENSPAN
FRANK A. ROSENFELD
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether a statutory exception to a general provision in the Social Security Act that was intended to protect the reliance interests of certain individuals violates the equal protection component of the Due Process Clause of the Fifth Amendment because it incorporates a gender-based classification previously held unconstitutional in a different context.

2. Whether a severability clause which provides that if any part of a statutory exception is found invalid the exception shall not be applied to any other person or circumstance is an unconstitutional usurpation of judicial power by the legislature.

PARTIES TO THE PROCEEDING

Appellees represent a nationwide class composed of "all applicants for husbands' insurance benefits * * * whose applications * * * have been denied [on or after October 12, 1979] solely because of the statutory requirement that husbands must have received more than one-half of their support from their wives in order to be entitled to benefits" (App. B, *infra*, 10a).

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OPINIONS BELOW

The opinion of the district court (App. A, *infra*, 1a-9a) is not reported. The opinions arising out of the administrative proceedings (Apps. D, E and F, *infra*, 13a-14a, 15a-22a, 23a-26a) are not reported.

JURISDICTION

The judgment of the district court (App. G, *infra*, 27a-28a) was entered on August 25, 1982. The notice of appeal (App. H, *infra*, 29a) was filed on September 21, 1982. On November 10, 1982, Justice Powell extended the time for docketing an appeal to and including December 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set out in App. I, *infra*, 30a-34a.

STATEMENT

1. The Social Security Act provides spousal benefits for the widows, widowers, wives and husbands of retired and disabled wage earners (42 U.S.C. (& Supp. IV) 402(b) and (c)). Spousal benefits are based on the earnings of the retired or disabled wage earners, and are available to persons age 62 or over who are entitled to either minimal or no old-age or disability benefits on their own account. Prior to December 1977, the Act imposed a dependency requirement on husbands seeking spousal benefits—benefits were payable only if husbands could demonstrate dependency on their wage earner wives for one-half of their support. Former 42 U.S.C. 402(c)(1)(C) (App. I, *infra*, 31a). Wives, on the other hand, could qualify for benefits without having to satisfy a dependency requirement. 42 U.S.C. 402(b).

On March 2, 1977, this Court held that the one-half support requirement for widowers' benefits under former 42 U.S.C. 402(f) violated the equal protection component of the Due Process Clause of the Fifth Amendment. *Califano* v. *Goldfarb*, 430 U.S. 199 (1977). Thereafter, on March 21, 1977, the Court summarily affirmed two district court decisions striking down the one-half support requirement for husbands' benefits. *Califano* v. *Silbowitz*, 430 U.S. 924 (1977); *Jablon* v. *Califano*, 430 U.S. 924 (1977).

Largely in response to these decisions, Congress amended the Social Security Act in December 1977. Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509, 42 U.S.C. (Supp. IV) 301 *et seq.* One of Congress' objectives in amending the Act was to eliminate the "gender-based differences of treatment for men and women under present law." H.R. Rep. No. 95-702 (Pt. 1), 95th Cong., 1st Sess. 4 (1977). Congress eradicated two of those differences in the then-existing law by removing the constitutionally objectionable one-half support eligibility requirements for husbands' and

widowers' benefits. Section 334(b)(1) and (d)(1) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. IV) 402(c)(1) and (f)(1).[1]

Although eliminating the one-half support requirement removed a constitutional infirmity from the Act, it created a serious fiscal problem for the Social Security trust fund. Generally, a person entitled to two different Social Security benefits does not receive the full amount of both benefits, because the two benefits are offset against each other. 42 U.S.C. 402(k)(3)(A).[2] In 1977, however, federal and state government pensions were not subject to the general offset provisions of the Social Security Act, and a recipient of such a pension could receive both his government pension and unreduced spousal benefits if he qualified for spousal benefits. Elimination of the one-half support requirement made substantial numbers of retired male federal and state employees eligible for unreduced spousal benefits based on their wives' earnings. "This result[ed] in 'windfall' benefits to some retired government employees." See also *President Carter's Social Security Proposals: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. 158 (1977) (statement of Robert M. Ball).

In order to reduce the drain on the Social Security trust fund arising from elimination of the one-half support requirement, Congress included a "pension offset"

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[1] The 1977 amendments did not eliminate all gender-based distinctions in the Act, however. Although the one-half support requirement for widowers and husbands was removed from the Act in 1977, the question whether to eliminate other gender-based distinctions was subjected to further study. H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 73 (1977).

[2] For example, if an individual is entitled both to benefits on his own work account and to spousal benefits, the worker's benefit is paid in full, with spousal benefits limited to the amount, if any, by which those benefits exceed the worker's benefit.

provision in the 1977 amendments to the Act. This offset provision generally requires that spousal benefits be reduced by the amount of certain state or federal government pensions received by an eligible spouse.[3] Section 334(a)(2) and (b)(2) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. IV) 402(b)(4)(A) and (c)(2)(A). See S. Rep. No. 95-572, 95th Cong., 1st Sess. 27-28 (1977). But, while the "pension offset" was a reasonable and equitable means of dealing with windfall spousal benefit payments to federal and state retirees who, prior to 1977, had no expectation of receiving them, Congress was concerned with the effect of the new offset provision on those persons who were already retired or about to retire from government service and who, through no fault of their own, had planned their retirements on the assumption that they would receive full unreduced spousal benefits. Faced with the prospect of depriving this latter group of spouses of the benefits they had expected to receive, Congress elected to except them from the operation of the pension offset provision. Section 334(g)(1) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. IV) 402 note. This provision excepts from the operation of the pension offset those spouses eligible for a government pension prior to December 1982 who would have been eligible for full spousal benefits under the Act "as it was in effect and being administered in January 1977." As noted above, in January 1977 the Act required husbands, but not wives, to demonstrate dependency on their wage earner spouses prior to receiving spousal benefits.

The pension offset exception also contains a severability clause which states that "[i]f any provision of

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[3] Government pensions are subject to the offset if the employment upon which the pension is based was not covered under Social Security on the last day the individual was employed. Section 334(a)(2) and (b)(2) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. IV) 402(b)(4)(A) and (c)(2)(A).

this subsection * * * is held invalid * * * the application of this subsection to any other persons or circumstances shall also be considered invalid." Section 334(g)(3) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. IV) 402 note. The severability clause was included "so that if [the pension offset exception] is found invalid the pension-offset as passed by the Senate would not be affected, and the application of the exception clause would not be broadened to include persons or circumstances that are not included within it." H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 71-72 (1977); S. Conf. Rep. No. 95-612, 95th Cong., 1st Sess. 71-72 (1977).

2. On November 18, 1977, appellee retired from employment with the United States Postal Service (App. A, *infra*, 2a). His wife had retired from her employment four months earlier, and was fully insured under the Social Security Act (*ibid.*). In December 1977, appellee filed an application for husband's benefits on his wife's account (*ibid.*). On March 23, 1978, the Social Security Administration informed appellee that, although he was entitled to husband's insurance benefits of $153.30 per month,[4] this amount would be offset dollar-for-dollar by his $573 per month Postal Service pension, in accordance with the provisions of Section 334(a)(2) and (b)(2) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. IV) 402(b)(4)(A) and (c)(2) (App. A, *infra*, 2a). No net spousal benefits were therefore payable to appellee.

Appellee sought reconsideration of the Social Security Administration's initial decision (App. F, *infra*, 23a) and was subsequently granted a hearing before an administrative law judge (ALJ). The ALJ concluded that the pension offset provisions of the 1977 amendments applied to appellee, inasmuch as he did not fall

[4] Social Security Award Certificate, dated March 13, 1978 (Tr. 45). ("Tr." refers to the transcript of the administrative proceedings in this case.)

within the terms of the pension offset exception provided by Section 334(g)(1), 42 U.S.C. (Supp. IV) 402 note (App. E, *infra*, 20a). "Since claimant did not meet the dependency requirements of the law in effect in January of 1977, the government pension offset must be applied on a dollar-for-dollar basis against the amount of his husband's benefits. Since his pension exceeds the amount of his husband's insurance benefits, nothing is payable to him" (*ibid.*). The decision of the ALJ was affirmed by the Appeals Council on October 11, 1979, and became the final decision of the Secretary of Health and Human Services (App. D, *infra*, 13a-14a).

3. Appellee brought this class action under Section 205(g) of the Act, 42 U.S.C. (Supp. IV) 405(g), seeking a declaration that Section 334(g)(1)(B) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. IV) 402 note, denied him and others similarly situated the equal protection of the laws. Appellee contended that enforcing the pension offset provisions of the 1977 amendments against him, and not against similarly situated nondependent women, was unconstitutional. Appellee also asserted that the severability clause contained in Section 334(g)(3) of the 1977 amendments was unconstitutional. On August 11, 1982, the district court entered an order certifying a nationwide class composed of "all applicants for husbands' insurance benefits * * * whose applications * * * have been denied [on or after October 12, 1979] solely because of the statutory requirement that husbands must have received more than one-half of their support from their wives in order to be entitled to benefits" (App. B, *infra*, 10a). Two weeks later the district court entered an opinion (App. A, *infra*, 1a-9a) and order (App. G, *infra*, 26a-27a) holding both Section 334(g)(1)(B) and its severability clause unconstitutional.

The district court noted that Section 334(g)'s exception to the pension offset provision "differentiates between men (who must prove they received at least one-

half of their support from their wives in order to fall within the exception) and women (who need not prove any spousal support to fall within the exception)" (App. A, *infra*, 4a). This "gender-based classification," the court concluded, can be constitutional only if it "'serve[s] important governmental objectives and [is] substantially related to achievement of those objectives'" (*ibid.*, quoting *Craig* v. *Boren*, 429 U.S. 190, 197 (1976)).

The district court recognized that the congressional purpose in enacting the pension offset exception was to protect the reliance interests of persons, primarily women, who planned their retirements from government service on the assumption that they would receive undiminished spousal benefits (App. A, *infra*, 5a). The court nevertheless reasoned that protection of these reliance interests did not justify incorporating a gender-specific requirement into the pension offset exception. "Congress, in requiring that men prove dependency, presumed that women would have relied upon the practices of the Social Security Administration, yet men would not have relied upon a decision of the Supreme Court" (*ibid.*).

The district court stated that the pension offset exception would be constitutional had Congress required both men and women to show dependency in order to obtain its benefits. This proposal was considered by Congress, but was ultimately rejected because of the administrative burdens it would create (App. A, *infra*, 5a-6a). Such efficiency considerations were found to be insufficient to save the statute. "[A]dministrative convenience," the court concluded, is "a wholly inadequate justification for gender-based discrimination" (*id.* at 6a). Because the court found "no rational basis for the discriminatory, gender-based classification contained in Section 334(g)(1)," it held that the "portion of the exception to the pension offset provision that requires a

male applicant to prove that he received one-half of his economic support from his wife violates the equal protection guarantees of the due process clause of the fifth amendment" (*id.* at 6a-7a).

The district court next noted that "Congress anticipated the likelihood that a court would declare the pension offset exception invalid" (App. A, *infra*, 7a). Congress specifically inserted a severability clause into the pension offset exception to prevent its application to non-qualifying claimants should any provision of the exception be held invalid (Section 334(g)(3), 42 U.S.C. (Supp. IV) 402 note). Notwithstanding the clear import of this provision, however, the court felt "compelled" to hold that the severability clause represents "an unconstitutional usurpation of judicial power by the legislative branch of the government" (App. A, *infra*, 7a).

The severability clause, the district court reasoned, was an attempt by Congress "to mandate the outcome of any challenge to the validity of the [pension offset] exception by making such a challenge fruitless" (App. A, *infra*, 8a). Moreover, the operation of the severability clause was found to be "in direct contravention of Congress' avowed intent to protect the expectation and reliance interests of those individuals who had retired or would retire within five years of the enactment of the pension offset" (*ibid.*). Because giving the severability clause effect would deny the benefits of the pension offset exception to anyone, the court concluded that "the severability clause is not an expression of the true Congressional intent, but instead is an adroit attempt to discourage the bringing of an action by destroying standing" (*ibid.*). The court accordingly ordered that the pension offset exception be expanded to include nondependent husbands, permitting appellee and all other class members to collect benefits free from the pension offset provisions of the 1977 Social Security

amendments (*id.* at 9a). The court recognized that its decision "will create a financial drain upon the Social Security fund" (*ibid.*), but dismissed this consideration as irrelevant. "The economic aspects of this case * * * cannot outweigh the importance of preserving fundamental constitutional values" (*ibid.*).[5]

THE QUESTION IS SUBSTANTIAL

The decision of the district court invalidates two significant provisions of the Social Security Act and imposes a substantial financial drain upon the Social Security trust fund. In enacting the Social Security Amendments of 1977, Congress determined, after careful consideration, that governmental pensions must be offset against spousal benefits to reduce costs and to prevent millions of retired state and federal workers from receiving double benefits. Congress then crafted a narrowly limited exception to this pension offset requirement to protect the reliance interests of those "who are already retired, or close to retirement, from public employment and who cannot be expected to readjust their retirement plans to take account of the 'offset' provisions that will apply in the future." H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 71-72 (1977); S. Conf. Rep. No. 95-612, 95th Cong., 1st Sess. 71-72 (1977). The severability clause inserted into the exception provision evidences Congress' clear intent that the benefits of the provision not be extended beyond the class defined by Congress. *Ibid.* The district court's decision thwarts this carefully designed plan by holding both the exception provision's reliance on a gender-based classification and its severability clause unconstitutional, thereby thrusting significant unanticipated financial burdens on the Social Security system.

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[5] The district court subsequently stayed its order pending appeal to this Court (App. C, *infra*, 12a).

The decision clearly deserves the attention of this Court.

1. Congress was mindful of this Court's March 1977 decisions invalidating the one-half support requirement for husbands' benefits when it amended the Act in December 1977. See S. Rep. No. 95-572, 95th Cong., 1st Sess. 27 (1977). In fact, one of Congress' purposes in passing the 1977 amendments was to eliminate the gender-based distinction found objectionable in *Califano* v. *Goldfarb*, *supra*, and related cases. H.R. Rep. No. 95-702 (Pt. 1), 95th Cong., 1st Sess. 4 (1977). Elimination of the one-half support requirement for widowers' and husbands' benefits, however, dramatically expanded the number of potential spousal beneficiaries. This in turn resulted in the windfall payment of unreduced husbands' benefits to retired government workers who in most instances were not dependent upon their spouses, thus imposing a severe financial burden on the Social Security trust fund. Congress therefore determined that a pension offset provision, similar to the one applicable to workers in the private sector, was a reasonable and equitable means of dealing with this potential windfall and budgetary crisis.

Although the pension offset alleviated one problem, Congress was concerned that some present and future retirees would be unjustly penalized if the pension offset were applied to them, because they had planned their retirements on the assumption that they could supplement their pensions with unreduced spousal benefits, in reliance on the pre-March 1977 terms of the Act. H.R. Conf. Rep. No. 95-837, *supra*, at 71-72. Congress was justifiably concerned with protecting those persons—primarily wives, but also husbands meeting the dependency test—who, for a significant period of time, had reasonably relied on receiving full spousal benefits and had planned their retirements accordingly.

Congress included the pension offset exception in the 1977 amendments to protect these reliance interests.

Congress' sole motivation in enacting the pension offset exception was to protect the expectancies of those persons who were already retired or who were nearing retirement.[6] The fact that Congress chose eligibility for spousal benefits in January 1977 as a criterion for exemption from the pension offset in no way suggests a sexually discriminatory animus. Congress selected the eligibility standards in effect on that date simply because the only persons who could have planned their retirements on the assumption that they would receive unreduced spousal benefits were those who would have been eligible for spousal benefits under the Act as it existed in January 1977. Those persons receiving government pensions who became eligible for spousal benefits under the Social Security Act solely as a result of the March 1977 decisions and the December 1977 amendments necessarily must have planned their retirements on the assumption that they would not receive any spousal benefits at all.

While the pension offset exception was plainly designed to protect the reliance interests of those individuals who had planned their retirements under the pre-1977 administration of the Social Security Act, the severability clause inserted into the exception embodies

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[6] The pension offset exception applies only to those spouses who meet the January 1977 statutory requirements and are eligible for benefits prior to December 1982. Although the exception expired on December 1, 1982, this case did not become moot on that date. The exception, by its express terms, safeguards the spousal benefits of claimants filing after November 1982 so long as the claimants would have been eligible for a government pension prior to December 1982 had they made proper application for such benefits. Section 334(g)(2), 42 U.S.C. (Supp. IV) 402 note. In addition, benefits payable after December 1982 to claimants satisfying the offset exception prior to that date are not subject to the offset.

a clear legislative mandate to construe the exception narrowly. Section 334(g)(3) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. IV) 402 note, was expressly included in the pension offset exception so that the provision "would not be broadened [by the courts] to include persons or circumstances that are not included within it." H.R. Conf. Rep. No. 95-837, *supra*, at 71-72; S. Conf. Rep. No. 95-612, *supra*, at 71-72. The clause represents Congress' determination that, if the reliance interests of the class defined in the pension offset exception cannot be protected, reliance interests in general must give way to the overriding public policy contained in the pension offset provisions of the 1977 legislation.

The district court's decision rejects Congress' considered judgment that, except for a limited class of retirees who legitimately relied on receiving unreduced spousal benefits, fiscal necessity requires the immediate offset of government pensions against spousal benefits. Instead, the district court has postponed for five years the start of the offset program, resulting in enormous expense for the Social Security trust fund.[7] This decision, in a nationwide class action, frustrates the will of Congress and plainly warrants review by this Court.[8]

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[7] The Social Security Administration estimates that, even based on conservative assumptions, the district court's extension of spousal benefits to previously unqualified claimants will cost in excess of $140 million from October 1979 through December 1982 alone.

[8] The pension offset exception has been the subject of much recent litigation. In *Rosofsky* v. *Schweiker*, 523 F. Supp. 1180 (E.D.N.Y. 1981), the district court held that the exception's use of the one-half support test was unconstitutional, but the court nevertheless applied the severability clause to uphold the Secretary's denial of benefits. This court noted probable jurisdiction of the Secretary's appeal, No. 81-1551 (May 2, 1982), but the claimant failed to appeal the denial of his benefits, and the

2. In addition to the importance of the question presented here, further review is required because the district court's legal analysis of the pension offset exception and severability clause is erroneous.

a. The pension offset exception is gender neutral on its face. It states that "individual[s]" receiving or becoming eligible to receive government pensions within a five-year period who would have qualified for spousal benefits under the Act "as it was in effect and being administered in January 1977" are exempt from the pension offset. Section 334(g)(1), 42 U.S.C. (Supp. IV) 402 note. By its terms, the provision protects not only

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Secretary thus was forced to move this Court to dismiss the government's appeal. That motion was granted on June 22, 1982. In *Miller* v. *Department of Health and Human Services*, 517 F. Supp. 1192 (E.D.N.Y. 1981), the court upheld the pension offset exception in the face of an equal protection challenge. In *Webb* v. *Harris*, 509 F. Supp. 1091 (N.D. Cal. 1981), appeal pending, No. 81-4256 (9th Cir.), the district court held that a government pensioner did not have to satisfy the January 1977 one-half support requirement because Congress could not be presumed to have incorporated an unconstitutional criterion in the pension offset exception. The government has appealed, maintaining that Congress plainly intended to incorporate all of the January 1977 criteria and that the pension offset exception, so construed, does not violate the equal protection component of the Fifth Amendment. The district court in *Wachtell* v. *Schweiker*, No. 80-8022-Civ. ALH (S.D. Fla. Jan. 26, 1982), appeal pending, No. 82-5552 (11th Cir.), reached the same result as did the court in *Webb*.

There are also three unreported decisions dealing with the pension offset exception. *Duffy* v. *Harris*, No. 79-386 (D.N.M. Oct. 23, 1979) (exception held constitutional); *Hudgins* v. *Harris*, No. M-79-1939 (D. Md. Apr. 17, 1980) (pension offset held valid); *Caloger* v. *Harris*, No. H-80-388 (D. Md. Mar. 25, 1981) (non-dependent claimants have no standing to challenge the constitutionality of the pension offset exception because, if successful, they could not gain relief because of severability clause). Currently pending are at least four cases challenging the constitutionality of the pension offset exception.

wives but also those husbands who, because they rely on their wives for one-half of their support, satisfy the January 1977 requirements for spousal benefits.

Although the exception is facially neutral, it does incorporate a gender-specific eligibility standard. That standard, which requires husbands (but not wives) to demonstrate dependency on their wage-earner spouses for one-half of their support, has been held to be an unconstitutional eligibility criterion in certain circumstances. *Califano* v. *Goldfarb*, 430 US. 199 (1977); *Califano* v. *Silbowitz*, 430 U.S. 924 (1977); *Jablon* v. *Califano*, 430 U.S. 924 (1977). These decisions, however, do not require the invalidation of the one-half support rule as incorporated into the pension offset exception. Nothing in the above decisions suggests that it is unconstitutional for Congress to protect the economic interests of persons who justifiably relied on receiving unreduced spousal benefits. *Cf. Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971).

In order to withstand scrutiny under the equal protection component of the Due Process Clause, "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). In *Goldfarb*, a five-to-four decision with no majority opinion, the plurality held that a gender-specific one-half support requirement, based as it was on "'old notions'" and "'archaic and overbroad' generalizations" about women, violated the Due Process Clause because it did not "serve important governmental objectives" and was not "substantially related to the achievement of those objectives." 430 U.S. at 210-211 (citations omitted). Similar sentiments were echoed by Justice Stevens in his decisive concurring opinion. "It is fair to infer that habit, rather than analysis or actual reflection, made it seem acceptable to equate the terms 'widow' and 'dependent surviving

spouse.'" 430 U.S. at 222 (Stevens, J., concurring). It was this "automatic reflex" that persuaded Justice Stevens that "this discrimination against a group of males is merely the accidental byproduct of a traditional way of thinking about females." *Id.* at 222-223.[9]

In enacting the pension offset exception invalidated by the court below, Congress was not motivated by a sexist animus, nor did it intend to effectuate and perpetuate discredited stereotypes regarding the proper roles and perceived frailties of women. *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 210-211. The exception was not, in any sense, a reflexive congressional reaction or an "accidental byproduct" of traditional thinking regarding sexual roles. *Id.* at 222-223 (Stevens, J., concurring). Elimination of the unconstitutional one-half support requirement in 1977 significantly expanded the class of potential spousal beneficiaries. Congress, well aware that this class of newly eligible spousal beneficiaries included significant numbers of government pensioners who may have contributed little or nothing to the Social Security trust fund, enacted a pension offset to prevent those beneficiaries from receiving dual benefits. But Congress also realized that application of the pension offset to some retirees was unjust. Accordingly, it enacted the pension offset exception in order to protect those retired or soon-to-be retired spouses who reasonably relied on the terms of the pre-*Goldfarb* spousal benefits provisions. The stated purpose of the grandfather provision, in contrast to the one-half support rule as originally enacted, is not to protect pre-

[9] Justice Stevens, however, suggested that he would have sustained the one-half support rule had it been the result of a conscious "legislative decision to favor females in order to compensate for past wrongs, or a legislative decision that the administrative savings exceed the cost of extending benefits to nondependent widows." 430 U.S. at 222 (Stevens, J., concurring).

sumptively dependent or helpless women, but rather to protect those spouses—wives and husbands alike—who stood to be demonstrably and seriously harmed by the 1977 amendments. Thus, the pension offset exception is supported by real, legitimate economic considerations totally unrelated to any presumed differences between men and women.[10]

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[10] This Court has repeatedly upheld similar gender-based classifications when supported by solid economic or other relevant considerations. For instance, in *Califano* v. *Webster*, 430 U.S. 313 (1977), the Court upheld a Social Security formula that slightly favored women in the calculation of average monthly wages. The Court found the distinction constitutional because Congress had passed it in response to statistics indicating that it is more difficult for older women than older men to obtain reasonable employment and that older women, even if they find employment, are paid considerably less. Similarly, the Court upheld a state property tax exemption granted to widows but not widowers in *Kahn* v. *Shevin*, 416 U.S. 351 (1974). The Court, citing data indicating that women's median incomes were substantially below those for men, and recognizing that "[t]he disparity is likely to be exacerbated for the widow * * * [who] in many cases * * * will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer" (416 U.S. at 354)(footnote omitted) held that the differential treatment was justified. In *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), the court upheld reduction in force statutes that allowed women Naval and Marine officers a longer period of tenure than men officers before being mandatorily discharged. Because women officers were generally ineligible for sea duty, the classification "reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service." 419 U.S. at 508 (emphasis in original). Finally, the Court recently upheld all-male draft registration (*Rostker* v. *Goldberg*, 453 U.S. 57 (1981)), and the California statutory rape statute, under which only men can be criminally liable. *Michael M.* v. *Superior Court*, 450 U.S. 464 (1981).

The pension offset exception clearly serves the important governmental objective of protecting reliant spouses against financial hardships that could result from an unexpected reduction of spousal benefits. See *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 177 (1980). The provision also promotes the substantial government interest in maintaining citizens' confidence in the fair and orderly processes of government. The exception, furthermore, is substantially related to the achievement of these important objectives. By incorporating the 1977 eligibility requirements into the provision, Congress has perfectly tailored the exception to those persons who actually relied on pre-*Goldfarb* law. As explained above, the only persons who could have planned their retirements on the assumption that they would receive unreduced spousal benefits are those who could have qualified for them in January 1977. Finally, by limiting eligibility for the exemption to a five-year period, Congress has adopted the least restrictive means consistent with the achievement of those objectives. See also *City of New Orleans* v. *Dukes*, 427 U.S. 297, 305 (1976).

United States Railroad Retirement Board v. *Fritz*, *supra*, provides a striking parallel to the instant case. In *Fritz*, this Court upheld against an equal protection challenge a grandfather provision in the Railroad Retirement Act of 1974, 45 U.S.C. (& Supp. IV) 231, which, like the present case, exempted specified classes of railroad employees from the elimination of certain dual retirement benefits. In sustaining the grandfather provision, the Court noted that Congress could properly protect the economic "expectations" (449 U.S. at 177) of certain classes of employees by means of a grandfather provision, and that the applicability of such a grandfather provision could be limited to those employees having the "greater equitable claim to [unreduced] benefits" (*id.* at 178). Congress has attempted to

achieve the same results here. As in *Fritz*, Congress sought to eliminate dual retirement benefits while at the same time protecting those present and future retirees who legitimately relied on the receipt of such benefits. In both instances Congress attempted to preserve the integrity of the federal treasury while recognizing the relative equities of those affected by the change in the law. Such action was consistent with the equal protection component of the Fifth Amendment in *Fritz*, and nothing in the present case requires a different result.

b. The district court invalidated the severability clause contained in Section 334(g)(3) of the pension offset exception, 42 U.S.C. (Supp. IV) 402 note, on the ground that it represented "an unconstitutional usurpation of judicial power by the legislative branch of the government" (App. A, *infra*, 7a). With due respect, however, we submit that by ignoring the clear legislative intent expressed in Section 334(g)(3), and by ordering the payment of Social Security benefits to a class of persons not entitled to them by statute, the district court has improperly intruded upon the prerogatives of Congress.

This Court has often considered the "inherent problem of challenges to underinclusive statutes" (*Orr* v. *Orr*, 440 U.S. 268, 272 (1979)) and the "remedial alternatives" of "extension" and "nullification" (*Califano* v. *Westcott*, 443 U.S. 76, 89 (1979)), without suggesting that a legislative determination not to sever a benefit statute following a holding of partial invalidity would raise constitutional problems. See *Stanton* v. *Stanton*, 421 U.S. 7, 17 (1975); *Craig* v. *Boren*, 429 U.S. 190, 210 n.24 (1976); *Stanton* v. *Stanton*, 429 U.S. 501, 504 n.4 (1977). In any event, the district court's premise that Section 334(g) is merely "an adroit attempt to discourage the bringing of an action by destroying standing" is plainly mistaken (App. A, *infra*, 8a).

"Separability clauses, including the one involved in this case, have merely a potential effect on the outcome of litigation." *Rosofsky* v. *Schweiker*, 523 F. Supp. 1180, 1188 (E.D.N.Y. 1981), prob. juris. noted, No. 81-1551 (May 2, 1982), appeal dismissed (June 22, 1982). A severability clause is "not an inexorable command." *Dorchy* v. *State of Kansas*, 264 U.S. 286, 290 (1924). Thus, even though the severability clause in this case creates a presumption that if the pension offset exception is invalid the pension offset provisions will thereafter be applied to all applications for spousal insurance benefits, that result is not such a foregone conclusion that appellee lacks standing. Rather, at the time this suit was filed there was the possibility that appellee would benefit from a favorable decision of the district court. See *Orr* v. *Orr*, *supra*, 440 U.S. at 271-273.

Moreover, appellee would have standing to challenge the pension offset exception even if it were clear from the outset that the pension offset provisions are not severable. Appellee has no constitutional right to the receipt of dual pension benefits; his right is to be treated consistently with the Due Process Clause in regard to eligibility for such benefits. Even if appellee could not obtain dual pension benefits directly from the lawsuit, he could still "derive [the] personal benefit" (App. A, *infra*, 8a) of having the offset exception struck down as to wives and dependent husbands, so that all benefit recipients would be treated equally. If the offset exception were invalidated as to all claimants, and Congress were thus made aware that it could not draw the line as it did, Congress would have the opportunity to reconsider whether to extend the offset exception to everyone, including the members of appellee's class. Hence, contrary to the district court's assertion (*ibid.*), the severability clause does not destroy the incentive of persons such as appellee to bring suit challenging the pension offset exception. See *Orr*

v. *Orr*, *supra*, 440 U.S. at 271-273. Appellee, therefore, clearly had standing to contest the Secretary's application of the 1977 pension offset provisions to his spousal benefits, and Section 334(g)(3) cannot be invalidated as an unconstitutional attempt to destroy that standing.

The district court's failure to apply the severability clause in this case flies squarely in the face of the legislative intent animating the Social Security Amendments of 1977. The severability clause provides, in the clearest terms, that "[i]f any provision of [the pension offset exception], or the application thereof to any person or circumstance, is held invalid, the remainder of this section shall not be affected thereby, but the application of the [pension offset exception] to any other persons or circumstances shall also be considered invalid" (Section 334(g)(3), 42 U.S.C. (Supp. IV) 402 note). The clause plainly expresses Congress' intent "that if [the pension offset exception] is found invalid the pension-offset as passed by the Senate would not be affected, and the application of the exception clause would not be broadened to include persons or circumstances that are not included within it." H.R. Conf. Rep. No. 95-837, *supra*, at 71-72; S. Conf. Rep. No. 95-612, *supra*, at 71-72.

Section 334(g)(3) is a "strong severability clause" (*Califano* v. *Westcott*, *supra*, 443 U.S. at 90) and is entitled to substantial deference by a court construing the pension offset exception. The district court's conclusion (App. A, *infra*, 8a) that the severability clause "is not an expression of the true Congressional intent" is clearly in error. The legislative history of the Social Security Amendments of 1977 unmistakably reveals Congress' conclusion that state and federal government pensions must be offset against spousal benefits in order to eliminate double benefits and staunch a substantial drain on the Social Security trust fund occasioned by the elimi-

nation of the one-half support requirement. S. Rep. No. 95-572, *supra*, at 27-28. The pension offset exception, although designed to "protect the expectation and reliance interests of those individuals who had retired or would retire within five years of the enactment of the pension offset" (App. A, *infra*, 8a), is plainly subsidiary to the congressional intent to eliminate double benefits and reduce costs. H.R. Conf. Rep. No. 95-837, *supra*, at 71-72; S. Conf. Rep. No. 95-612, *supra*, at 71-72. The severability clause embodies Congress' considered conclusion that, should the courts determine that the pension offset exception cannot be limited to the class it defined, reliance and expectation interests must give way to the overriding policy underlying the pension offset provisions of the 1977 legislation. Section 334(g)(3), in effect, is a "nonseverability" clause, clearly evidencing "'that the Legislature would not have enacted those provisions [of the pension offset exception] which are within its power, independently of that which is not.'" *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (per curiam) (quoting *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932)). The district court erred in ignoring the plain congressional direction embodied in Section 334(g)(3).

The district court's decision has recreated the same fiscal crisis that Congress found intolerable in 1977. Substantial numbers of retired male federal and state employees are once again eligible for spousal benefits based on their wives' earnings, in direct conflict with the clear intent of Congress. Review by this Court is plainly warranted.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

REX E. LEE
Solicitor General
J. PAUL MCGRATH
Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
RICHARD G. WILKINS
Assistant to the Solicitor General
ROBERT S. GREENSPAN
FRANK A. ROSENFELD
Attorneys

DECEMBER 1982

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CIVIL ACTION NO. 79-G-5251-NE

Filed: August 24, 1982

Entered: August 25, 1982

ROBERT H. MATHEWS AND MARY M. MATHEWS, AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

MEMORANDUM OPINION

Plaintiff, Robert H. Mathews, brings this action individually and on behalf of all other persons similarly situated, and seeks to have this court declare unconstitutional the pension offset provisions of Section 202(c)(2), 42 U.S.C. § 402(c)(2), contained in Section 334(b)(2) and (g) of Public Law 95-216. Plaintiff Mathews represents a class comprised of all applicants for husbands' insurance benefits under Section 202(c)(2) of the Social Security Act, 42 U.S.C. § 402(c)(2), whose applications, requests for reconsideration, hearings, or Appeals Council reviews have been denied solely because of the statutory requirement that husbands must have received more than one-half of their support from their wives in order to be entitled to benefits, and who received notice of such denials on or after the 60th day prior to December 11, 1979.[1]

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[1] The court certified the class in its order entered August 11, 1982.

Robert Mathews retired from employment with the United States Postal Service on November 18, 1977. His wife, Mary, had retired from her employment four months earlier than Mr. Mathews, and was fully insured under the Social Security Act. In December of 1977, Mr. Mathews filed an application for husband's insurance benefits based upon his wife's earnings record. In connection with his application for benefits under Section 202(c) of the Social Security Act, 42 U.S.C. § 402(c), Mr. Mathews informed the Social Security Administration that as a result of his own employment record, he was receiving a civil service pension of $573.00 per month. On March 23, 1978, the Social Security Administration advised the plaintiff that although he was entitled to husband's insurance benefits under § 202(c), the amount of his monthly benefit would be offset dollar-for-dollar by the amount of his civil service retirement pension, in accordance with the provisions of the 1977 amendments to the Social Security Act contained in Section 334 of Public Law 95-216. Because the amount of his pension exceeded the amount of the monthly benefit, Mr. Mathews was notified that he could receive no payments from Social Security. The plaintiff was granted a hearing before an administrative law judge, who affirmed the Administration's denial of benefits, stating that the plaintiff did not fall within the exception to the pension offset because he had not been receiving at least one-half of his support from his wife. The decision of the administrative law judge was affirmed upon review by the Appeals Council and became the final decision of the Secretary.

The pension offset provision set forth in § 202(c)(2) of the Social Security Act, 42 U.S.C. § 402(c)(2), was enacted in 1977 as an amendment to the husband's insurance benefits section of the Act. P.L. 95-216, the Social Security Amendments of 1977, § 334(b)(2) (December 20, 1977). The Social Security Amendments of 1977 also

contain an exception to the operation of the pension offset provision. Section 334(g)(1) of P.L. 95-216 provides that the pension offset is inapplicable to individuals who retired within five years of the enactment and who meet the requirements of § 202(c) of the Act as it existed and was administered in January of 1977. Section 202(c), 42 U.S.C. § 402(c), as it existed in January 1977 required that a husband receive one-half of his support from his wife in order to be entitled to husband's insurance benefits. In essence, therefore, the exception provides a five-year grace period for all women who retire within five years of the enactment, and for men who retire within five years of the enactment and who are economically dependent upon their wives.

In March of 1977, the Supreme Court declared unconstitutional the one-half support requirement for widowers' insurance benefits. *Califano* v. *Goldfarb*, 430 U.S. 199, 51 L. Ed. 2d 270, 97 S. Ct. 1021 (1977). Shortly after the *Goldfarb* decision, the Supreme Court summarily affirmed two lower court decisions that had declared unconstitutional the one-half support requirement for husbands' insurance benefits contained in § 202(c). *Califano* v. *Silbowitz*, 430 U.S. 924, 51 L. Ed. 2d 768, 97 S. Ct. 1539 (1977), *affirming Silbowitz* v. *Secretary of Health, Educ. & Welfare*, 397 F. Supp. 862 (S.D. Fla. 1975); and *Califano* v. *Jablon*, 430 U.S. 924, 51 L. Ed. 2d 768, 97 S. Ct. 1539 (1977), *affirming* 399 F. Supp. 118 (D. Md. 1975). The Court found in the *Goldfarb*, *Silbowitz*, and *Jablon* cases that the requirement that only males provide proof of economic dependency upon their spouses in order to receive benefits constituted an impermissible gender-based classification violative of the equal protection guarantees of the due process clause of the fifth amendment. Although the Court's analysis in *Goldfarb* centered upon the statute's

discriminatory impact upon female wage earners,[2] the Court acknowledged that such requirements also had an unconstitutional impact upon males. 430 U.S. at 209, n.8, 51 L. Ed. 2d at 278, n.8, 97 S. Ct. 1028, n.8; and 430 U.S. at 217, 51 L. Ed. 2d at 283, 97 S. Ct. at 1032 (Stevens, J., concurring).

As a result of *Goldfarb* and its progeny, the unconstitutionality of the one-half support requirement was determined prior to congressional enactment of the pension offset provision and the exception to the pension offset. One of the issues before this court is whether the one-half support requirement of § 202(c), although unconstitutional as a substantive provision, is constitutional when applied as a part of the exception to the pension offset provision.

Clearly, the exception to the pension offset provision differentiates between men (who must prove they received at least one-half of their support from their wives in order to fall within the exception) and women (who need not prove any spousal support to fall within the exception). Given the fact that the exception creates a gender-based classification, the question becomes whether the discriminatory classification "serve[s] important governmental objectives and [is] substantially related to achievement of those objectives." *Craig* v. *Boren*, 429 U.S. 190, 197, 50 L. Ed. 2d 397, 407, 97 S. Ct. 451, 457 (1976). The government contends that the gender-based discrimination contained in the pension

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[2] The Court reasoned that to require a husband, but not a wife, to prove economic dependency upon a spouse constituted impermissible discrimination against female wage earners in that the taxes paid by female workers produced less protection for their spouses than the taxes paid by male workers. 430 U.S. 204, 206-07, 51 L. Ed. 2d 270, 275, 97 S. Ct. 1021, 1026-27. *See also Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 43 L. Ed. 2d 514, 95 S. Ct. 1225 (1975), and *Frontiero* v. *Richardson*, 411 U.S. 677, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973).

offset exception was rationally calculated to protect the reliance interests of individuals who had already retired when the offset provision became law, or who would retire within five years of the enactment of the offset. The Conference Report that accompanied the pension offset bill reveals that Congress was more concerned with the expectations of women than with the expectations of all soon-to-retire individuals:

> The managers are concerned that there may be large numbers of women, especially widows in their late fifties, who are already drawing pensions, or would be eligible to draw them within 5 years of the date of the enactment of this bill, based on their non-covered work and whose retirement income was planned for on the assumption of the availability of full wife's or widow's benefits under Social Security.

Social Security Amendments of 1977, Conference Report No. 95-837, 95th Cong., 1st Sess., p. 72. Although the pension offset was enacted after the *Goldfarb* decision, wherein men were granted husbands' benefits without regard to dependency, Congress, in requiring that men prove dependency, presumed that women would have relied upon the practices of the Social Security Administration, yet men would not have relied upon a decision of the Supreme Court.

The court recognizes that most of the women eligible for benefits during the five-year period in question would probably have been able to show that they received at least one-half of their economic support from their husbands. Congress could easily have protected the reliance interest of these women by requiring a showing of economic dependency upon their husbands. Although Congress considered proof of dependency as a requirement for all applicants seeking to fall within the five-year grace period, it rejected the proposal under the presumption that to require women as well as men to prove dependency would create an administrative

burden upon the system. Report of the Committee on Finance, U.S. Senate, on H.R. 5322, Report No. 95-572, p. 28. Apparently, Congress presumed, just as it had presumed when it enacted the original one-half support requirement of § 202(c), that the majority of women would be economically dependent upon their husbands, and the majority of men would not be economically dependent.[3] Therefore, in order to avoid the paper work that would be generated by a requirement that all applicants prove spousal dependency, Congress opted for administrative convenience. The court finds that administrative convenience is a wholly inadequate justification for gender-based discrimination. *Califano* v. *Goldfarb*, 430 U.S. 199, 212 n.9, 51 L. Ed. 2d 270, n. 9, 97 S. Ct. 1021, 1029 n. 9; *Stanley* v. *Illinois*, 405 U.S. 645, 656-57, 31 L. Ed. 2d 551, 562, 92 S. Ct. 1208, 1215 (1972); *Frontiero* v. *Richardson*, 411 U.S. 677, 690, 36 L. Ed. 2d 583, 594, 93 S. Ct. 1764, 1772 (1973); *Reed* v. *Reed*, 404 U.S. 71, 76, 30 L. Ed. 2d 225, 230, 92 S. Ct. 251, 254 (1971). Likewise, the court rejects the government's contention that an across-the-board dependency requirement is unfeasible because it would be subject to manipulation. Defendant's brief at 15. If such is the case, it would seem that the males-only dependency test would be subject to manipulation as well.

The Court concludes that there is no rational basis for the discriminatory, gender-based classification contained in Section 334(g)(1) of Public Law 95-216. The classification is not substantially related to the attainment of a valid statutory goal. Therefore, the court holds that that portion of the exception to the pension

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[3] The court notes that the women least likely to receive the benefits, those women who were not receiving one-half of their economic support from their husbands at the time of the enactment, are the ones who will benefit most from the statutory discrimination. *See Califano* v. *Goldfarb*, 430 U.S. at 221, 51 L. Ed. 2d at 285, 97 S. Ct. at ____ (Stevens, J., concurring).

offset provision that requires a male applicant to prove that he received one-half of his economic support from his wife violates the equal protection guarantees of the due process clause of the fifth amendment.[4]

Congress anticipated the likelihood that a court would declare the pension offset exception invalid. Accordingly, a severability clause was inserted in the amendment, providing that "[i]f any provision of this subsection, or the application thereof to any person or circumstance, is held invalid, the remainder of this section shall not be affected thereby, but the application of this subsection to any other persons or circumstances shall also be considered invalid." P.L. 95-216, § 334(g)(3). The effect of this severability provision is that if any portion of the pension offset provision is stricken, then the pension offset will be applied to all government retirees, with no exceptions.

Although severability clauses are not per se invalid,[5] under the circumstances of the present case, this court is compelled to hold that the severability clause pertaining to the pension offset exception is an unconstitutional usurpation of judicial power by the legislative branch of the government. When the pension offset provision was enacted, Congress was well aware of the fact that the Supreme Court had declared unconstitutional the requirement that husbands prove economic dependency upon their spouses in order to receive

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[4] *See also Rosofsky* v. *Schweiker*, 523 F. Supp. 1180 (S.D. N.Y. 1981), wherein the exception to the pension offset provision was held unconstitutional for reasons similar to those found by this court. It should also be noted that the constitutionality of both the offset provision and its exception was upheld in *Duffy* v. *Harris*, Dkt. No. 79-386 (D. N.M. Oct. 23, 1979). In Duffy, however, although the court discussed the rational basis of the pension offset, it failed to articulate findings with regard to the rational basis of the exception to the offset.

[5] *See, e.g., Califano* v. *Westcott*, 443 U.S. 76, 61 L. Ed. 2d 382, 99 S. Ct. 2655 (1979).

benefits. By enacting a severability clause to accompany the unconstitutional requirement of the pension offset exception, Congress attempted to mandate the outcome of any challenge to the validity of the exception by making such a challenge fruitless. Even if a plaintiff achieved success in having the gender-based classification stricken, he would derive no personal benefit from the decision, because the pension offset would be applied to all applicants without exception.

The operation of the severability clause appears to be in direct contravention of Congress' avowed intent to protect the expectation and reliance interests of those individuals who had retired or would retire within five years of the enactment of the pension offset. Legislative history reveals that as to these retirees, Congress considered a five-year delay in the operation of the pension offset necessary to fundamental fair play. Yet, in a conflicting expression of Congressional intent, Congress would destroy the five-year grace period, along with the remainder of the pension offset exception, if any part of the exception is held invalid.

Common sense dictates that in order to allow the elderly to plan their futures, Congress would choose not to destroy the five-year grace period of the pension offset exception. The court is convinced, therefore, that the severability clause is not an expression of the true Congressional intent, but instead is an adroit attempt to discourage the bringing of an action by destroying standing. *See Caloger* v. *Mathews*, Dkt. No. H-80-388 (D. Md. March 25, 1981). Such an "in terrorem" approach would insulate the legislative work product from judicial scrutiny, in violation of the doctrine of separation of powers. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803). Clearly, Congress cannot be allowed to indirectly put into effect for five years a provision it was prohibited from effectuating directly.

For the foregoing reasons, the court finds that the severability clause contained in Section 334(g)(3) of Public Law 95-216 is unconstitutional. The court realizes that extending the five-year grace period to men as well as women will create a financial drain upon the Social Security fund. The economic aspects of this case, however, cannot outweigh the importance of preserving fundamental constitutional values. The defendant should be required to extend to the plaintiff and those members of the class he represents those benefits denied them as a result of the enforcement of the one-half support requirement of the pension offset exception. *See Califano* v. *Westcott*, 443 U.S. 76, 90, 61 L. Ed. 2d 382, 394, 99 S. Ct. 2655 (1979).

A separate order will be entered contemporaneously herewith.

Done this 24th day of August 1982.

/s/ J. Foy Guin, Jr.

United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CIVIL ACTION NO. 79-G-5251-NE

Filed: August 10, 1982

Entered: August 11, 1982

ROBERT H. MATHEWS AND MARY M. MATHEWS, AND OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

ORDER

This cause is before the court upon the motion of the plaintiffs for certification of this cause as a class action. Having considered the motion, briefs, and arguments of counsel, as well as the stipulation of the parties that the class is so numerous that joinder of all members is impracticable, the court is of the opinion that all the requirements of Rule 23 of the Federal Rule of Civil Procedure have been met and that this cause should proceed as a class action. Accordingly, it is

ORDERED, ADJUDGED and DECREED that this cause be and it hereby is CERTIFIED as a class action. The class is hereby defined as all applicants for husbands' insurance benefits under Section 202(c) of the Social Security Act, 42 U.S.C. § 402(c)(2), whose applications, requests for reconsideration, hearings, or Appeals Council reviews have been denied solely because of the statutory requirement that husbands must have received more than one-half of their support from their wives in order to be entitled to benefits; and who re-

ceived notice of such denials on or after the 60th day prior to December 11, 1979.

It is further ORDERED that Robert H. Mathews serve as a representative of said class.

It is further ORDERED that plaintiff Mary M. Mathews be and she hereby is DISMISSED as a plaintiff inasmuch as she lacks standing to be joined as a plaintiff in this cause, and inasmuch as the parties have agreed that her claims are due to be dismissed.

DONE and ORDERED this 10th day of August 1982.

/s/ J. FOY GUIN, JR.

United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CIVIL ACTION NO. 79-G-5251-NE

Filed:October 12, 1982

Entered: October 12, 1982

ROBERT H. MATHEWS, ET AL., PLAINTIFFS,

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

ORDER

This cause came before the court upon defendant's motion for stay of judgment pending final disposition of the case on appeal. Having considered the motion, the court is of the opinion it is due to be granted. Accordingly, it is

ORDERED, ADJUDGED and DECREED that defendant's motion for stay be and it hereby is GRANTED, and this cause is hereby STAYED pending a final ruling on appeal by the Supreme Court of the United States.

DONE and ORDERED this 8th day of October 1982.

/S/ J. FOY GUIN, JR.
United States District Judge

APPENDIX D

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
P.O. BOX 2518
WASHINGTON, D.C. 20013

October 11, 1979

Refer to: SGC
424-09-7494

Office of
Hearings and Appeals

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mr. Robert H. Mathews
Post Office Box 54
Cullman, Alabama 35055

Dear Mr. Mathews:

After the request for review of the hearing decision was received, a careful study was made of your case, the applicable law and regulations, the record before the administrative law judge, and the contentions made in support of the request.

Section 404.947a of Social Security Administration Regulations No. 4 (20 CFR 404.947a) provides that the Appeals Council will review a hearing decision where: (1) there appears to be an abuse of discretion by the administrative law judge; (2) there is an error of law; (3) the administrative law judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is broad policy or procedural issue which may affect the general public interest.

The Appeals Council has concluded that there is no basis under the above regulations for granting the request for review. Accordingly, the hearing decision stands as the final decision of the Secretary in your case.

If you desire a court review of the hearing decision, you may commence a civil action in the district court of the United States in the judicial district in which you reside within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing is otherwise made. See Section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)) and section 422.210 of Social Security Administration Regulations No. 22 (20 CFR 422.210).

If a civil action is commenced, the Bill of Complaint should name the Secretary of Health, Education, and Welfare as the defendant and should include the social security number(s) shown at the top of this notice.

Sincerely yours,
DAVID G. DANZIGER
Member, Appeals Council

cc:
SEPSC, RR, RSI, Birmingham, AL.
BO, Cullman (Decatur), AL.
HO, Florence, AL. (ALJ Eddens, Jr)

APPENDIX E

DEPARTMENT OF HEALTH, EDUCATION, AND WEFLARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

Name and Address of Claimant:
Mr. Robert H. Mathews
P.O. Box 54
Cullman, AL 35055

NOTICE OF UNFAVORABLE DECISION
PLEASE READ CAREFULLY

If you disagree, in whole or in part, with the enclosed decision you may request the Appeals Council to review it. However, your request for review must be filed within *60* days after the date of receipt of this notice. It will be presumed that this notice is received within 5 days after the date shown below, unless a reasonable showing is made otherwise. You (or your representative) may file a request for review at your local social security office or at the hearing office, or you may write or telephone one of these offices and indicate your intention to file a request for review. Your may send a written request for review directly to the Appeals Council, Bureau of Hearings and Appeals, SSA, P.O. Box 2518, Washington, D.C. 20013.

Unless you file a timely request for review by the Appeals Council, you may not obtain a court review of your case under section 205(g), 1631(c)(3), or 1869(b) of the Social Security Act.

This notice and enclosed copy of hearing decision mailed September 6, 1979

cc:

Name and Address of Representative:

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

DECISION

In the case of
Robert H. Mathews,

claimant

Mary M. Mathews,

(Wage Earner) (Leave blank if same as above)

Claim for
Husband's Insurance Benefits

424-09-7494

(Social Security Number)

This case is before the administrative law judge on a request for hearing.

ISSUES

Since it has been determined that claimant is entitled to husband's insurance benefits on the record of his wife, Mary M. Mathews, the only issue to be decided is whether the government pension offset was properly applied to his husband's insurance benefits.

LAW AND REGULATIONS

Section 202(c)(1) of the Social Security Act, as amended in 1977, provides that:

(c)(1) The husband (as defined in section 216(f) of an individual entitled to old-age or disability insurance benefits, if such husband—

(A) has filed application for husband's insurance benefits,

(B) has attained age 62, and (*see footnote 1)
(C) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount of his wife,

shall be entitled to a husband's insurance benefit for each month, beginning with the first month after August 1950 in which he becomes so entitled to such insurance benefits and ending with the month preceding the month in which any of the following occurs; he dies, his wife dies, they are divorced, or he becomes entitled to old-age or disability insurance benefits, based on a primary insurance amount which is equal to or exceeds one-half of the primary insurance amount of his wife, or his wife is not entitled to disability insurance benefits and is not entitled to old-age insurance benefits.

(2) (A) The amount of a husband's insurance benefits for each month as determined after application of the provisions of subsections (q) and (k) shall be reduced (but not below zero) by an amount equal to the amount of any monthly periodic benefit payable to such husband for such month which is based upon his earnings while in the service of the Federal Government or any State (or political subdivision thereof, as defined in section 218(b) (2) if, on the last day he was employed by such entitiy, such service did not constitute "employment" as defined in section 210.

(b) For purposes of this paragraph, any periodic benefit which otherwise meets the requirements of sub-

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*Footnote 1:

P.L. 95–216, § 334(b)(1), deleted subparagraph (C), and redesignated subparagraph (D) as subparagraph (C), effective for benefits payable for months beginning with December 1977 on the basis of applications filed in or after December 1977, except where benefits are based on earnings while in the service of the Federal Government or any State or Political subdivision.

paragraph (A), but which is paid on other than a monthly basis, shall be allocated on a basis equivalent to a monthly benefit shall constitute a monthly periodic benefit for purposes of subparagraph (A). For purposes of this subparagraph, the term "periodic benefit" includes a benefit payable in a lump sum if it is a commutation of, or a substitute for, periodic payments (*see footnote 2).

(3) Except as provided in subsection (q) and paragraph (2) of this subsection (*see footnote 3), such husband's insurance benefits for each month shall be equal to one-half of the primary insurance amount of his wife for such month.

Section 334 (g) of P. L. 95-216, the Social Security amendments of 1977 provided for reduced benefits for spouses receiving government pensions as follows:

(g)(1) The amendments made by the preceding provisions of this section shall not apply with respect to any monthly insurance benefit payable, under subsection (b), (c), (e), (f), or (g) (as the case may be) of section 202 of the Social Security Act, to any individual—

(a) to whom there is payable for any month within the 60-month period beginning with the month in which this Act is enacted (or who is eligible in any

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*Footnote 2:

P.L. 95-216, § 334(b)(2), amended paragraph (2) in its entirety, effective for benefits payable for months beginning with December 1977 on the basis of applications filed in or after December 1977, except where benefits are based on earnings while in the service of the Federal Government or any State, or political subdivision.

*Footnote 3:

P.L. 95-216, § 334(b)(3), inserted "and paragraph (2) of this subsection" after "subsection (q)", effective for benefits payable for months beginning with December 1977 on the basis of applications filed in or after December 1977, except where benefits are based on earnings while in the service of the Federal Government or any State or political subdivision.

such month for) a monthly periodic benefit (within the meaning of such provisions) based upon such individual's earnings while in the service of the Federal Government or any State (or political subdivision thereof, as defined in section 218(b) (2) of the Social Security Act); and

(B) who at time of application for or initial entitlement to such monthly insurance benefit under such section (b), (c), (e), (f), or (g) meets the requirements of that subsection as it was in effect and being administered in January 1977,

(2) For purposes of paragraph (10(A), an individual is eligible for a monthly periodic benefit for any month if such benefit would be payable to such individual for that month if such individual were not employed during that month and had made proper application for such benefit.

(e) If any provisions of this subsection, or the application thereof to any person or circumstance, is held invalid, the remainder of this section shall not be affected thereby, but the application of this subsection to any other persons or circumstances shall also be considered invalid.

EVIDENCE CONSIDERED

The administrative law judge has carefully considered all the testimony at the hearing, the arguments made, and the documents described in the List of Exhibits attached to this decisions.

EVALUATION OF THE EVIDENCE

It has been determined that claimant is entitled to husband's insurance benefits on the record of his wife, Mary M. Mathews.

The only question to be decided is whether the government pension offset was properly applied to his husband's insurance benefit.

Claimant retired from the United States Postal Service effective November 18, 1977, and was awarded a Civil Service retirement annuity in the amount of $573.00 per month. He was not receiving at least one-half of his support from his wife in January of 1977 or at the time she became entitled to retirement or disability insurance benefits.

The Government pension offset will apply to benefits payable December 1977 and thereafter if: (1) the individual is entitled to husband's or widower's insurance benefits; *and* (2) a pension from the Federal government, any State government, or any political subdivision thereof is payable to the individual; *and* (3) the pension is based on the individual's own earnings; *and* (4) the individual's earnings were not covered under the Social Security Act on the last day the individual was employed; *and* (5) the individual's entitlement is based on an application filed in or after December 1977.

The government pension offset will not apply if (1) the applicant would at the time for filing for husband's insurance benefits meet the requirements for entitlement to those benefits as they were in effect in January 1977, *and* (2) the applicant is receiving, or eligible to receive, a government pension for any month in the period December 1977 through November 1982.

In order to meet the requirements for husband's insurance benefits as they were in effect in January 1977, an individual must have been receiving one-half support from his wife at the beginning of her period of disability or at the time she became entitled to retirement insurance benefits.

Since claimant did not meet the dependency requirements of the law in effect in January of 1977, the government pension offset must be applied on a dollar-for-dollar basis against the amount of his husband's benefits. Since his pension exceeds the amount of his husband's insurance benefits, nothing is payable to him.

It should be noted that that portion of the article written by the District Manager of the Nashville Social Security Office (exhibit 7) quotes the law as set forth above.

It appears that the article put out by the American Postal Workers Union (exhibit 11) does not correctly quote Public Law 95-216 which contained the above amendments. Of course, the law as enacted by Congress is the law and not what they interpreted it to say. It was only half right when it quoted the offset would not apply for a 5 year period beginning in December 1977. It omitted the other half of the exception that to be excepted the individual also had to meet all the requirements for entitlement that existed and were applied in January 1977. This exception will rarely apply for applicants for husband's or widower's benefits since dependency on the spouse was a condition of entitlement as of January 1977.

In rendering this decision, the administrative law judge is not unmindful of Wienberger v. Wiesenfield, 420 U.S. 636, which probably prompted part of the above amendments. He is also familiar with Hurvich v. Califano, U.S. District Court, N. District of California, 457 F. Supp. 760 (1978). Of course, this latter case is not exactly in point and is also not a precedent for Fifth Circuit Cases.

While it is appreciated that claimant's frustration will increase each time he receives a notice of Social Security Benefit Information and Increase as set forth in exhibit 10, this merely indicates the amount to which he is entitled before offset takes place.

FINDINGS

1. Claimant is entitled to husband's insurance benefits beginning in *January, 1978.*

2. Claimant retired from the U.S. Postal Service effective November 18, 1977, and was awarded a Civil Service retirement annuity of $573.00 per month.

3. Claimant was not receiving at least one-half of his support from his wife at the time she became entitled to retirement or disability benefits *nor* in January 1977.

4. Claimant did not meet the dependency requirements of the law in effect in January 1977.

5. The government pension offset must be applied on a dollar-for-dollar basis against the amount of his husband's insurance benefits.

6. Since his pension exceeds the amount of his husband's insurance benefits, nothing is payable to him.

DECISION

It is the decision of the administrative law judge that the claimant is entitled to husband's insurance benefits on the earnings record of his wife, Mary M. Mathews. It is the further decision that the government pension offset as promulgated by the Social Security Amendments of 1977 applies and that as a result, no husband's insurance benefits are payable to him.

FRANK L. EDDENS, JR.
Administrative Law Judge

Date: SEP 6 1979

APPENDIX F

Social Security
Notice of Reconsideration

From: Bureau of Retirement and Survivors Insurance
Southeastern Program Service Center,
Birmingham, Alabama 35285

Date: April 24, 1979

Your Claim Number: 424-09-7494

Mr. Robert H. Mathews
P.O. Box 54
Cullman, Alabama 35055

Your claim has been reconsidered, as you requested. We find that the original decision was correct and in accordance with the law and regulations. The enclosed Reconsideration Determination fully explains the decision reached.

This reconsideration was made by a specially designated staff, different from the staff that made the original decision, and specially trained in the handling of reconsiderations. This staff made an independent and thorough examination of all the evidence on record about your claim.

If you believe that the Reconsideration Determination is not correct, you may request a hearing before an administrative law judge of the Bureau of Hearings and Appeals. If you want a hearing you must request it, not later than 60 days from the date you receive this notice. You should make any such request through any social security office. Please read the enclosed leaflet for a full explanation of your right to appeal.

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

RECONSIDERATION DETERMINATION

Program Center
Southeastern Program Service Center
Birmingham, Alabama 35285

District Office or Branch Office
Cullman, Alabama

Name of Wage Earner or Self-Employed Person
Mary M. Mathews

Social Security Claim No.
424-98-7494

Name of Claimant
Robert H. Mathews

Type of Claim
Husband's Insurance Benefits

Determination:

On December 15, 1977, Mr. Robert H. Mathews filed application for husband's insurance benefits on the record of his wife, Mary M. Mathews. He was found entitled in the amount of $153.20 beginning January 1978 which was increased to $163.20 beginning June 1978. These amounts were subsequently increased to $158.60 and $168.90 due to the inclusion of additional earnings for Mrs. Mathews. On March 13, 1978, Mr. Mathews was notified of his entitlement to benefits, but that no payment could be made because of his receipt of a government pension. On April 4, 1978, Mr. Mathews requested reconsideration, protesting the imposition of a government pension offset against his husband's benefit.

The question to be decided is whether the government pension offset was properly applied to Mr. Mathews' husband's insurance benefit.

Section 202(c)(2)(1)(A) of the Social Security Act, as amended in 1977, provides that the amount of a husband's insurance benefit shall be reduced by an amount equal to the amount of any monthly periodic benefit payable to such husband for such month which is based upon his earnings while in the service of the Federal government or any State (or political subdivision thereof as defined in Section 218(b)(2)) if, on the last day he was employed by such entity, such service did not constitute "employment," as defined in Section 210.

The Government pension offset will apply to benefits payable December 1977 and thereafter if: (1) the individual is entitled to husband's or widower's insurance benefits; *and* (2) a pension from the Federal government, any State government, or any political subdivision thereof is payable to the individual; *and* (3) the pension is based on the individual's own earnings; *and* (4) the individual's earnings were not covered under the Social Security Act on the last day the individual was employed; *and* (5) the individual's entitlement is based on an application filed in or after December 1977.

The government pension offset will not apply if (1) the applicant would at the time of filing for husband's insurance benefits, meet the requirements for entitlement to those benefits as they were in effect in January 1977, *and* (2) the applicant is receiving, or eligible to receive, a government pension for any month in the period December 1977 through November 1982.

In order to meet the requirements for husband's insurance benefits as they were in effect in January 1977, an individual must have been receiving one-half support from his wife at the beginning of her period of disability

or at the time she became entitled to retirement insurance benefits.

Mr. Mathews has stated that he retired from the Postal Service effective November 18, 1977, and was awarded a Civil Service retirement annuity in the amount of $573.00 per month. He has further stated that he was not receiving at least one-half of his support from his wife at the time she became entitled to retirement or disability insurance benefits.

Since Mr. Mathews did not meet the dependency requirements in the law in effect in January 1977, the goverment pension offset must be applied on a dollar-for-dollar basis against the amount of his husband's insurance benefits beginning January 1978. Since his pension exceeds the amount of his husband's insurance benefits, nothing is payable to Mr. Mathews on his wife's social security record.

Mr. Mathews has submitted some material from various sources concerning the government pension offset. The article written by the district manager of the Social Security Office in Nashville, Tennessee, was correct in advising Mr. Mathews that for the government pension offset exception to apply, a husband must meet the requirementrs in effect in January 1977. The other publications were misleading at best.

After a careful review of all the facts, we find upon reconsideration that the government pension offset was properly applied in January 1978 and thereafter to husband's insurance benefits otherwise payable to Mr. Mathews. This affirms our initial determination.

Chief, Reconsideration Branch

April 24, 1979
Date

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CIVIL ACTION NO. 79-G-5251-NE

Filed August 24, 1982

Entered August 25, 1982

ROBERT H. MATHEWS AND MARY M. MATHEWS, AND OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

ORDER

This cause is before the court upon the motion for declaratory judgment filed by plaintiff Robert H. Mathews individually and on behalf of the class he represents. Having considered the motion, pleadings, submissions of counsel, and applicable law, the court is of the opinion that Section 334(g)(1)(B) of the Social Security Amendments of 1977, P.L. 95–216, denies Mr. Mathews and the class he represents the equal protection of the laws guaranteed through the due process clause of the fifth amendment. The court is further of the opinion that Section 334(g)(3) of the Social Security Amendments of 1977, P.L. 95-216, is an unconstitutional usurpation of judicial power by the legislative branch. Accordingly, it is

ORDERED, ADJUDGED, DECREED and DECLARED that Section 334(g)(1)(B) and Section 334(g)(3) of the Social Security Amendments of 1977, P.L. 95-216, are unconstitutional. It is

FURTHER ORDERED that the defendant immediately pay to Mr. Mathews and the members of the class he represents those benefits they would have received

had it not been for the operation of Section 334(g)(1)(B); and it is

FURTHER ORDERED that the defendant immediately undertake to identify and notify all members of the class of this decision and order. The defendant shall, within 60 days, submit for the court's approval a plan for identifying and notifying the class members. The plaintiff may file objections to the proposed plan within 10 days of its filing with the court. The court retains jurisdiction for the purpose of implementing this order.

A separate opinion is being entered contemporaneously herewith.

DONE and ORDERED this 24th day of August 1982.

/s/ J. Foy Guin, Jr.

UNITED STATES DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CIVIL ACTION NO. 79-G-5251-NE

Filed: September 21, 1982

ROBERT H. MATHEWS AND MARY M. MATHEWS, AND OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES

Notice is hereby given this 21st day of September, 1982, that Defendant Richard Schweiker, Secretary, Department of Health and Human Services, hereby appeals to the Supreme Court of the United States from the Order and Memorandum Opinion of this Court in the above-styled action filed on the 24th day of August, 1982, and entered on the 25th day of August, 1982. This appeal is taken pursuant to Title 28, United States Code, Sections 1252 and 2101.

By his attorney,

FRANK W. DONALDSON
United States Attorney

HERBERT J. LEWIS, III
Assistant United States Attorney

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Section 202(c) of the Social Security Act, 42 U.S.C. (Supp. IV) 402(c), provides in pertinent part:

> (1) The husband (as defined in section [216(f)] of this title) of an individual entitled to old-age or disability insurance benefits, if such husband—
>
> (A) has filed application for husband's insurance benefits,
>
> (B) has attained age 62, and
>
> (C) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife,
>
> shall be entitled to a husband's insurance benefit for each month, beginning with the first month after August 1950 in which he becomes so entitled to such insurance benefits and ending with the month preceding the month in which any of the following occurs: he dies, his wife dies, they are divorced, he becomes entitled to an old-age or disability insurance benefit based on a primary insurance amount which is equal to or exceeds one-half of the primary insurance amount of his wife, or his wife is not entitled to disability insurance benefits and is not entitled to the old-age insurance benefits.
>
> (2)(A) The amount of a husband's insurance benefit for each month as determined after application of the provisions of subsections (q) and (k) of this

section shall be reduced (but not below zero) by an amount equal to the amount of any monthly periodic benefit payable to such husband for such month which is based upon his earnings while in the service of the Federal Government or any State (or political subdivision thereof, as defined in section [218 (b)(2)] of this title) if, on the last day he was employed by such entity, such service did not constitute "employment" as defined in section [210] of this title.

3. Former Section 202(c) of the Social Security Act, 42 U.S.C. 402(c), provides in pertinent part:

(1) The husband (as defined in section [216(f)] of this title) of an individual entitled to old-age or disability insurance benefits, if such husband—

(A) has filed application for husband's insurance benefits,

(B) has attained age 62,

(C) was receiving at least one-half of his support, as determined in accordance with regulations prescribed by the Secretary, from such individual—

(i) if she had a period of disability which did not end prior to the month in which she became entitled to old-age or disability insurance benefits, at the beginning of such period or at the time she became entitled to such benefits, or

(ii) if she did not have such a period of disability, at the time she became entitled to such benefits,

and filed proof of such support within two years after the month in which she filed application with respect to such period of disability or after the month in which she became entitled to such benefits, as the case may be, or, if she did not have such a period, two years after the month in which she became entitled to such benefits, and

(D) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability

insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife,

shall be entitled to a husband's insurance benefit for each month, beginning with the first month after August 1950 in which he becomes so entitled to such insurance benefits and ending with the month preceding the month in which any of the following occurs: he dies, his wife dies, they are divorced, he becomes entitled to an old-age or disability insurance benefit based on a primary insurance amount which is equal to or exceeds one-half of the primary insurance amount of his wife, or his wife is not entitled to disability insurance benefits and is not entitled to old-age insurance benefits.

4. Section 334(g) of the Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1546, 42 U.S.C. (Supp. IV) 402 note provides:

> (1) The amendments made by the preceding provisions of this section [section 334 of Pub. L. 95-216] shall not apply with respect to any monthly insurance benefit payable, under subsection (b), (c), (e), (f), or (g) (as the case may be) of section 202 of the Social Security Act, to an individual—
>
> (A) to whom there is payable for any month within the 60-month period beginning with the month in which this Act is enacted (or who is eligible in any such month for) a monthly periodic benefit (within the meaning of such provisions) based upon such individual's earnings while in the service of the Federal Government or any State (or political subdivision thereof, as defined in section 218(b)(2) of the Social Security Act); and
>
> (B) who at time of application for or initial entitlement to such monthly insurance benefit under such subsection (b), (c), (e), (f), or (g) meets the requirements of that subsection as it was in effect and being administered in January 1977.

(2) For purposes of paragraph (1)(A), an individual is eligible for a monthly periodic benefit for any month if such benefit would be payable to such individual for that month if such individual were not employed during that month and had made proper application for such benefit.

(3) If any provision of this subsection, or the application thereof to any person or circumstance, is held invalid, the remainder of this section shall not be affected thereby, but the application of this subsection to any other persons or circumstances shall also be considered invalid.

5. Section 202(j)(2) of the Social Security Act, 42 U.S.C. (Supp. IV) 402 (j)(2), as amended by Section 306(a), Pub. L. No. 96-265, 94 Stat. 457, provides in pertinent part:

(2) An application for any monthly benefits under this section filed before the first month in which the applicant satisfies the requirements for such benefits shall be deemed a valid application (and shall be deemed to have been filed in such first month) only if the applicant satisfies the requirements for such benefits before the Secretary makes a final decision on the application and no request under section [205(b)] of this title for notice and opportunity for a hearing thereon is made or, if such a request is made, before a decision based upon the evidence adduced at the hearing is made (regardless of whether such decision becomes the final decision of the Secretary).

6. Section 204(b) of the Social Security Act, 42 U.S.C. 404(b), provides in pertinent part:

In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this [title] or would be against equity and good conscience.

7. Section 334(f) of the Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1546, 42 U.S.C. (Supp. IV) 402 note provides:

> (f) The amendments made by this section [Section 334 of P.L. 95-216] shall apply with respect to monthly insurance benefits payable under title II of the Social Security Act for months beginning with the month in which this Act is enacted, on the basis of applications filed in or after the month in which this Act is enacted.